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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KEVIN MIRCH, PETITIONER

v.

SUPREME COURT STATE OF NEVADA,
STATE BAR OF NEVADA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the disbarment of Petitioner Kevin Mirch violate due process and equal protection of the laws as guaranteed by the First, Fifth, Sixth and Fourteenth Amendments in order to protect and advance the political agenda of a major Nevada law firm and a District Court judge aspiring for election to a seat on the Nevada Supreme Court?

2. Was the disbarment of Mr. Mirch in retaliation of Mr. Mirch's complaints to state and federal officials, including Senator Harry Reid (D) of Nevada of questionable conduct of prominent Nevada citizens in violation of the law and public interest?

3. Do Due Process violations underlying Mr. Mirch's disbarment include , but are not limited to : denial of his right to confront his accuser (Justice Hardesty); Denial of the right to fair notice of the charges against Mr. Mirch; accepting the unsworn testimony of a major witness at the Bar hearing, when such testimony was not taken under oath?

4. Were Mr. Mirch's Constitutional Rights were violated when the Nevada Supreme Court disbarred Mr. Mirch without a full hearing en banc, much less a hearing at all?

5. Did the Nevada Supreme Court err when it determined that Petitioner's due process rights were not violated?

6. Did the State Bar's complaint failed to provide

adequate notice of what conduct constituted the alleged wrong doing in violation of Petitioner's due process rights?

A. The Nevada state bar provided insufficient notice as to what alleged wrongdoing constituted a violation of Nevada Supreme Court Rule 170;

B. The Nevada State bar failed to provide adequate notice of prior uncharged bad acts

C. The Nevada State bar failed to provide adequate notice that it would allege service of a summons and complaint within the 120 days required by law violated Nevada Supreme Court Rule 170;

D. The Nevada State Bar failed to provide adequate notice that it would allege Petitioner's failure to investigate violated Nevada Supreme Court Rule 170.

9. Was Petitioner was denied his Constitutional right to confront his accuser?

10. Was Peitioner denied his Constitutional right to due process when The Nevada Supreme Court improperly accepted the unsworn testimony of Bruce Laxalt

11. Was discipline imposed by the Nevada Supreme Court was excessive and must be reversed.

12. Is the ethical rule under which Mr. Mirch was disbarred Nevada Supreme Court Rule 170 is void for vagueness, and therefore unconstitutional?

13. Did the District Court, Nevada State Bar Disciplinary Panel and Nevada Supreme Court ignored the procedural and due process requirements for a summary judgment motion?

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PETITION FOR A WRIT OF CERTIORARI

KEVIN MIRCH, Petitioner, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of Certiorari to the Supreme Court of the State of Nevada and the State Bar of Nevada reversing the disbarment of Petitioner for filing an action alleging misconduct by the politically prestigious Law Firm of McDonald Carano & McDonald for committing a number of acts of litigation misconduct through the Disciplinary Board of the State Bar of Nevada. Mr. Mirch was not allowed a hearing before the Supreme Court of the State of Nevada.

OPINIONS BELOW

On October 9, 2003, the Honorable James W. Hardesty, District Judge for the Second Judicial District Court State of Nevada, entered an order of summary judgment sua sponte, and referred the matter for review by the Nevada State Bar. *Appendix 1a-16a.*

The Nevada State Bar Disciplinary Panel failed to conduct any independent investigation and merely adopted the Order of James Hardesty, entertained additional charges of misconduct without notice to the Petitioner, ignored State Bar Counsel's request for sanctions of a one year suspension, and entered Findings of Fact and Conclusions of Law on March, 2007, imposing the ultimate sanction against Petitioner - that being disbarment.

The Nevada Bar's recommendation was the subject of an automatic appeal to the Nevada Supreme

Court, which, in an opinion dated April 10, 2008 disbarred Petitioner, Kevin J. Mirch. *Appendix 17a-25a*

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED(see appendix)

STATEMENT

The Nevada Supreme Court and the State Bar of Nevada intentionally violate Mr. Mirch's due process rights by threatenin him with disbarment, sanctions, loss of millions of dol rs in contingency fees obtained in a judgement entitle *USI v. APP* . These threats were made against Mr. Mirch because he had (1) refused to participate in litigation fraud; (2) refused to participate in fraudulently altering of transcripts generated by Court Reporting Firms that had direct connection through family ownership in a Law Firm known as Lemons, Grundy & Eisenberg.

In this case, Mr. Mirch disclosed to the Attorney General's that Lemons, Grundy, & Eisenberg, had illegally transcribed deposition testimony without permission found in FRCP 26-28. The case resulted in a summary judgment which admittedly had over 100 pages of altered pages that were not disclosed until Mr. Mirch learned that over 100 pages were missing on from depositions of the Defense in *Wiseman v. Washoe County*, United States District Court District of Nevada (Reno) CIVIL DOCKET FOR CASE #: 3:98-

Mr. Wiseman, who was responsible for money being collected discovered millions of dollars missing and over 100 pages of testimony removed from Judge Agosti's deposition testimony. This is significantly important testimony as Judge Hardesty immediately sought concealment of the missing documents and money which Mr. Wiseman was investigating. At that time, Judge Hardesty concealed evidence that was significant in determining if fraudulent records or money was missing from the State of Nevada.

Mr. Mirch eventually was retained as Mr. Wiseman's Counsel. Once retain, Judge Hardesty employed a diligent effort to destroy Mr. Mirch personal career. Instead of seek misused fees Hardesty sought to protect himself and those individuals that were protested by large charges currently facing societies ability to pay for gasoline. There was no reason to attack either Mr. Mirch nor Mr. Wiseman. Both individuals were interested only in reducing charges that were excessive and designed only to protest individuals being protected to raise substantial money at the exclusion of individuals suffering from excessive fees and costs needed to make it to work . Judge Hardesty should not have attached Mr. Mirch nor Wiseman when their sole purpose was to reduce excessive charges and make our community able to survive excessive fees Mr. Hardesty diligently pursued sanctions, disbarment, concealment of corporate records and any other means to undermine Mr. Mirch's attempts to save money for the State of Nevada's Citizens. Judge Hardesty adamantly attacked Mr. Mirch in an effort to protest himself from obvious

attacks against him by Judge Hardesty who ruled that a motion to dismiss was a motion for summary judgment without permission by Mr. Mirch; referred to the State Bar for disbarment; charged with crimes which were later dropped and eventually disbarred in order to prevent him from pursuing Mr. Wiseman's charges against judges involved in theft of funds from the court system, altering transcripts in predominantly significant cases industry cases (gaming, manufacturing of gaming devices, prostitution, altering transcripts in jury cases; requiring contributions made to predominantly demanding jury contribution casino cheating cases, defective litigation involving ; and causing charges to be tendered against law firms who were pursuing litigation against politically stout law firms. The illegal conduct included paying one Judge Hardesty for favorable rulings; accepting payments for political contributions without disclosing remuneration to opposing parties; allowing favored court reporters to falsely report transcripts, thus resulting in incorrect judgments, threats of disbarment, sanctions, physical harm is he disclosed illegal conduct had been disclosed to violate the Mr. Mirch's due process rights after he disclosed illegal by disbarring him after he had be threatened for disclosing illegal conduct.

Mr. Mirch was attacked by Judge Hardesty because he insisted on disclosing a multi million dollar award being disclosed to the Santa Barbara Bankruptcy Court.

Mr. Mirch was also sanctioned and eventually disbarred for insisting that the Bankruptcy Court Order be followed. Specifically, Mr. Mirch had obtained a multi million dollar judgment after several years of

litigation. See *USI v. APP*, United States District Court District of Nevada (Reno) CIVIL DOCKET FOR CASE #: 3:00-cv-00580-ECR-VPC. Frank knew that he was gong to win and moved the court for an order to convert a Chapter 11 to a Chapter 7.

The impact of the conversion was to conceal millions of dollars from bankruptcy creditors until it was safe to release the funds to the Cayman Islands. Frank did not inform the Bankruptcy Court that millions of dollars were going to be turned over to Dr. Frank. Even Mr. Mirch was not aware of the conversion nor the status of the Bankruptcy. Prior to the conversion, Bankruptcy Judge Riblet, order all bankruptcy assets to be transferred a Chapter 7 Estate. Dr. Frank repeatedly represented that there were no assets, while knowing that millions of dollars were concealed, waiting for the conversion. After approximately 5 years it was discovered that Dr. Frank had been concealing the at least 4 million dollars in assets in a number of locations. Dr. Frank was waiting for an appropriate time to take the assets and then leave the United States. When Mr. Mirch learned about the concealed assets, he advised Dr. Frank's new counsel that disclosure had to be made in accordance with Judge Riblet's order. Upon making that statement, Leigh Goddard, Esq, told Mr. Mirch that if he disclosed the location of the assets he would be sued for malpractice, disbarred, and subject to criminal investigation. Undaunted, Mr. Mirch refused to withhold the concealed assets. For over a year, Petitioner was repeatedly threatened. The tension was so severe that Mr. Mirch suffered a stroke, lost a great part of his vision for several months, suffered gross and fine motor infirmities. To this day, Mr. Mirch still

suffers impairment. While Mr. Mirch endured stroke symptoms, vision impairment, motor limitations, and movement skills, the State Bar of Nevada intensified its attacks on Mr. Mirch in order to prevent his disclosure of outrageous misconduct ongoing throughout the state of Nevada, hoping that Mr. Mirch would suffer a permanent injury which would stop his pursuit against corruption.

CONSTITUTIONAL ISSUES PRESENTED TO THE COURT

"The practice of law is a valuable property right. No one can be deprived of this valuable property right without due process of law." *Burleigh v. State Bar*, 98 Nev 140 (1982).

a. The United States Constitution Guarantees Due process in State Bar disciplinary matters

The issue of due process to be afforded a licensed attorney in a disciplinary matter is not new concept, but well rooted in the rights afforded by the United States Constitution. The Nevada Legal Disciplinary Board, and the Nevada Supreme Court have desecrated this fundamental right in favor of protecting the self -appointed political hierarchy that places its own agenda above the Petitioner's right to seek redress through the judicial system.

The United States Supreme Court has a history of enforcing the United States Constitution in the context of state disbarment of a licenced attorney.

For instance, in *In re Ruffalo*, 390 U.S. 544; 88 S. Ct. 1222 (1968), this Court held that the attorney was deprived of procedural due process because the charges against him were improperly amended on the basis of his testimony in the proceedings. The charge had to be known before the proceedings commenced. Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which includes fair notice of the charge. When proceedings for disbarment are not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense. *Id.*

Attorney disciplinary proceedings are adversary proceedings of a quasi-criminal nature. An attorney who is subjected to disbarment proceedings is entitled to procedural due process, which includes fair notice of the charge. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended or expanded on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

The absence of fair notice as to the reach of the disbarment proceedings and the precise nature of the charges deprives an attorney of procedural due process when he is subjected to disbarment proceedings, where his disbarment is based on a charge of misconduct which was not in the original charges, but was added as a result of testimony presented by him and his witness during disbarment

hearings. A lawyer charged with misconduct in a disbarment proceeding is entitled to procedural due process, which includes fair notice of the charge. *Id*

In the present case, Petitioner had no notice that any prior or subsequent conduct would be considered in determining whether the filing of the underlying civil complaint against McDonald Carano was a disbarment offense until after the petitioner had testified.

Finally, there was no de novo hearing before the Court of Appeals. Rather, it rested on the State Bar of Nevada Disciplinary Panels's record and findings, and the Order of disbarment was not determined by the Nevada Supreme Court en banc.

The *In re Ruffalo, supra,* the United States Supreme Court further explained:

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall. 333, 380; *Spevack v. Klein*, 385 U.S. 511, 515. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See *In re Oliver*, 333 U.S. 257, 273. It was said in Randall v. Brigham, 7 Wall. 523, 540, that when proceedings for disbarment are "not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense." Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is

whether "the state procedure from want of notice or opportunity to be heard was wanting in due process." *Selling v. Radford*, 243 U.S. 46, 51.

In the present case petitioner had no notice that past conduct or subsequent conduct (suing in federal court for injunctive relief against the bar to prevent the due process violations) would be considered in his disbarment, until well into the bar hearing when the panel members challenged this conduct, and when it was included in the recommendations for disbarment to the Nevada Supreme Court "Such procedural violation of due process would never pass muster in any normal civil or criminal litigation." n3 370 F.2d, at 462.

These are adversary proceedings of a quasi-criminal nature. *Cf. In re Gault*, 387 U.S. 1, 33. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh. n4

Unquestionably, this absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process. The discipline recommended and adopted by the Nevada Supreme Court sua sponte disbarred Petitioner, as Bar Counsel had merely asked for suspension. The increased discipline was based on other past and subsequent conduct that was not before the panel as there was no notice nor an opportunity to be heard, both of which are mandated by the fourteenth amendment to Petitioner that he would have to defend

those charges.

This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process. *In Re: Ruffalo, supra.*

b. The conduct of the Nevada State Bar Disciplinary Panel and Nevada Supreme Court is a "taking" in violation of the Fifth and Fourteenth Amendments of the United States Constitution

The "Takings" Clause of the Fifth Amendment forbids the taking of "private property . . . for public use, without just compensation." U.S. CONST. AMEND. V. The Takings Clause applies against the states through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980). The Courts use a two-step analysis to determine whether a " taking " has occurred: first, it must determine whether the subject matter is "property" within the meaning of the Fifth Amendment and, second, it must establish whether there has been a taking of that property, for which compensation is due. *Konizeski v. Livermore Labs* (In re Consol. U.S. Atmospheric Testing Litig.), 820 F.2d 982, 988 (9th Cir. 1987).

It is well established "that a sanction for professional misconduct adversely affects an attorney's vested right to practice law. . . . Thus, attorneys subject to disciplinary proceedings are entitled to due process of law. . . . We traditionally have recognized that the right to appellate review of an order imposing sanctions

is part and parcel of those due process rights accorded to a disciplined attorney. Because a license to practice law is a vested property interest and disciplinary proceedings are adversary proceedings of a quasi-criminal nature, an attorney subject to discipline is entitled to due process of law" [As a procedural matter, before imposing any . . . sanctions [on an attorney], the court must afford the . . . attorney a proper hearing . . . . There must be fair notice and an opportunity for a hearing on the record. . . . This limitation . . . is particularly appropriate with respect to a claim of bad faith or frivolous pleading by an attorney, which implicates his [or her] professional reputation." (Citations omitted; internal quotation marks omitted.) *CFM of Connecticut, Inc. v. Chowdhury*, 239 Conn. 375, 393, 685 A.2d 1108 (1996), overruled in part on other grounds by *State v. Salmon*, 250 Conn. 147, 735 A.2d 333 (1999).

In attorney disciplinary proceedings, two interests are of paramount importance. On the one hand, the courts must not tie the hands of grievance committees and . . . courts with procedural requirements so strict that it becomes virtually impossible to discipline an attorney for any but the most obvious, egregious and public misconduct. On the other hand, courts must ensure that attorneys subject to disciplinary action are afforded the full measure of procedural due process required under the constitution so that they are not unjustly deprive them of their reputation and livelihood." *Burton v. Mottolese*, supra, 267 Conn. 19-20.

c. The disbarment of Mr. Mirch for filing a lawsuit violates his First Amendment right to petition the government for redress of grievances

The disbarment of Mr. Mirch was in retaliation for a complaint he had filed against McDonald Carano in district court, in violation of his First Amendment right to petition for redress of grievances.
which are carried to the States by the Fourteenth Amendment.

REASONS FOR GRANTING THE PETITION

a. THE ETHICAL RULE UPON WHICH PETITIONER'S DISBARMENT IS FOUNDED IS VOID FOR VAGUENESS AND THEREFORE UNCONSTITUTIONAL

Former Supreme Court Rule 170, the ethical rule in effect upon which Mr. Mirch's disbarment is founded is unconstitutional ion its face, as it is vague and ambiguous and does not give fair notice of what constitutes a violation.

Specifically, Nevada SCR 170, in effect at the time of the conduct prosecuted by the State Bar and upheld by the Nevada Supreme Court provides in part:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. (added 1-27-86, eff. 3-28-86) (later replaced

by 2007 amendment by SCR 1.3).

The Rule is vague as it does not contain a definition of frivolous. Comment 2 provides some guidance:

> The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been duly substantiated or because a lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or, if the lawyer is unable to either make a good faith argument on the merits of the action taken or to support the action by a good faith argument for the extension, modification or reversal of existing law.

The comment provides an attorney with three "safe harbors". An attorney can file an action wherein the facts are not "fully substantiated". An attorney can file an action where he expects to develop necessary evidence in discovery. A lawyer can file an action which he believes will fail. The rule does not require a lawyer to be able to explain that the action was not brought to harass someone, and/or maliciously injure someone. Neither the rule nor the comments answer one question about the application of the rule. The question is whether an objective or subjective standard is used. However, the drafters of Rule 170 in

comparing the Model Rule to the comparable Model Code rule state "the test on Rule 3.1 (SCR 170) is an objective test". Since the rule provides no test to determine whether the claim is frivolous, it is void as to vagueness and therefore unconstitutional as it fails to give Petitioner adequate notice.

The language is unconstitutional because it creates a " rule or standard which [is] so vague and indefinite that no one could know what it was." *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239-40, 69 L. Ed. 589, 45 S. Ct. 295 (1925). "'The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Posters ' N' Things, Ltd. v. United States*, 511 U.S. 513, 525, 128 L. Ed. 2d 539, 114 S. Ct. 1747 (1994) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)). Due process requires that a State provide meaningful standards to guide the application of its laws. See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) . A state law that lacks such standards is void for vagueness. The void-for-vagueness doctrine applies not only to laws that proscribe conduct, but also to laws that vest standard less discretion in the trier of fact to fix a penalty. See *United States v. Batchelder*, 442 U.S. 114, 123 (1979). The United States Supreme Court has found in considering notice and due process requirements that State Bar Disciplinary proceedings are quasi-criminal in nature. *See In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222 (1968).

b. THE STATE BAR'S COMPLAINT FAILED TO PROVIDE ADEQUATE NOTICE OF WHAT CONDUCT CONSTITUTED THE ALLEGED WRONG DOING IN VIOLATION OF APPELLANT MIRCH'S DUE PROCESS RIGHTS

1. Introduction

In the Complaint, the State Bar of Nevada failed to provide adequate notice of what conduct constituted the alleged wrongdoing which violated SCR 170.[1] The State Bar merely incorporated by reference Judge Hardesty' s Order granting summary judgment and imposing sanctions against Mr. Mirch. SCR 170 is not the subject of Judge Hardesty's Order.

In a two page bare bones Complaint, the Bar simply makes four general allegations: (1)Mr. Mirch filed a complaint; (2) Judge Hardesty entered an Order regarding the complaint; (3) the State Bar adopts all factual and legal findings by Judge Hardesty in his Order; and (4) Mr. Mirch violated SCR 170. More specifically, the State Bar alleged:

> 1. In September 2002, Respondent filed a Complaint and a First Amended Complaint in the Second Judicial District Court, which named the law firm of McDonald, Carano, and Wilson, LLP, and Nevada attorney Leigh Goddard as Defendants.

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[1] Nevada SCR 170 was replaced by Rule 3.1 of the Nevada Rules of Professional Conduct after the conclusion of the formal hearing, but before the Panel issued its written decision.

2. On October 9, 2003, the Honorable James W. Hardesty, District Judge entered an Order relevant to the pending Complaint. A certified copy of this Order is attached hereto as Exhibit 1 and is incorporated by reference herein.

3. As part of this disciplinary Complaint, the State Bar of Nevada further adopts and incorporates by reference each and every factual finding and legal finding made by the Court in the attached Order.

4. Based upon the above, Respondent's conduct is in violation of SCR 170 (Meritorious claims and contentions).

Although the State Bar alleged a violation of Supreme Court Rule 170 (Meritorious Claims and Contentions),[2] the Bar failed to allege which facts contained in Judge Hardesty' s Order support the elements of SCR 170. The State Bar failed to even recite the elements of a SCR 170 violation.

The notice and hearing requirements guaranteed through the Fifth and Fourteenth Amendments to the

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[2] SCR (Nevada Supreme Court Rule) 170 states as follows:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

United States Constitution are not new principles. The concepts ensuring basic fairness are embedded in our constitutional and political history and the mandates of the concepts are certain.

For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 66, 80, 92 S.Ct. 1983, 1994 (1972)(internal citations omitted).

"Basic concepts of fairness and due process require that one who is charged with a wrongdoing be put on notice as to what conduct constitutes the wrong." *Whitney v. State Employment Security Dep't*, 105 Nev. 810, 813 (1989).

The Supreme Court Rules mandate that the State Bar fulfill the basic concepts of due process. SCR 105(2) requires the State Bar to file a clear and specific written complaint that informs the respondent of the charges against him. By simply deferring to the civil conclusions of Judge Hardesty, the Bar failed to provide a clear and specific written complaint in violation of SCR 105(2) and due process requirements.

It was improper for the State Bar to adopt Judge Hardesty' s Order without independent factual and legal allegations. Indeed, prior to the hearing, Bar Counsel acknowledged,". . . we have to independently corroborate what Judge Hardesty says in his Order.

We have to produce independent corroborating evidence in that regard, and we will." Bar Counsel concedes that evidence independent of Judge Hardesty's Order is required at the Hearing. Likewise, independent factual and legal allegations were required in the Formal Complaint.

2. THE STATE BAR PROVIDED INSUFFICIENT NOTICE AS TO WHAT ALLEGED WRONGDOING CONSTITUTED A VIOLATION OF SCR 170

The State Bar provided Petitioner Mirch with insufficient notice of what alleged wrongdoing constituted the violation of 5CR 170. The State Bar improperly relied upon Judge Hardesty's Order alone, which was insufficient for the State Bar proceedings. In opposition to Petitioner Mirch's Motion to Dismiss based upon insufficient notice, the State Bar argued that it was "adopting and incorporating the factual and legal findings made by Judge Hardesty in his Order." However, Judge Hardesty makes factual and legal findings in reference to NRCP 12(b)(5) and imposes sanctions pursuant to NRCP 11, Judge Hardesty does not make any factual and legal findings specific to a SCR 170 violation. By adopting Judge Hardesty's factual and legal findings, the State Bar adopted factual and legal findings relating to summary judgment and sanctions. The State Bar adopted no factual and legal findings relating to ethical rules because Judge Hardesty did not make any findings relating to ethical rules. NRCP 11 and SCR 170 are not identical nor are the rules interchangeable. In the twelve page Order, Judge Hardesty referenced SCR 170 only to say:

> Initially, the Court believes Mirch has committed a violation of the Rules of Professional Conduct. See SCR 170. Pursuant to the Nevada Code of Judicial Conduct, Canon D(2), the Court refers this matter to the Nevada State Bar Counsel for disciplinary investigation. Defendants' counsel is ordered to send a copy of this Order and all pleading in this case to Bar Counsel within 10 days of the date of this Order.

Judge Hardesty does not make any findings as to what facts constitute the violation of SCR 170 nor does Judge Hardesty set forth the elements of a SCR 170 violation.

The State Bar improperly relied upon Judge Hardesty's Order. The Order finds a violation of NRCP 11, not a violation of 5CR 170. The State Bar acknowledges that there are differences in the elements of NRCP 11 and SCR 170. Further, the State Bar acknowledges the differences in the standard of proof required to find a violation of NRCP 11 and SCR 170. The Bar's sole reliance upon an order in a civil proceeding was improper and prejudiced Petitioner Mirch. Without specific allegations regarding ethical violations, Appellant Mirch was not prepared to adequately defend himself against the allegations and arguments made by the Bar at the hearing. Indeed, Mrs. Mirch perhaps said it best when she argued that her defense reminded her of her children's video game, "where all these things are coming out and you just have to shoot at them randomly because you don't know what's coming at you. What is it that Mr. Mirch did wrong? Was it in the facts of the case? Was it in the

legal basis for the case? Is it Doe plaintiffs? Is it because he didn't bring suit in federal court? Or is it because he didn't serve it until even within the rules of the 120 days?"

3 STATE BAR FAILED TO PROVIDE ADEQUATE NOTICE OF PRIOR UNCHARGED BAD ACTS

The State Bar failed to provide Petitioner Mirch with adequate notice that the State Bar would introduce collateral evidence of prior uncharged bad acts. Throughout the proceedings, Counsel for the State Bar argued that Mirch's conduct in this matter was not isolated, but represented a pattern of practice. Counsel for the State Bar introduced evidence, despite objections, of uncharged prior bad acts. Judge Hardesty does mention two instances of alleged prior bad acts in his Order, Judge Hardesty does not consider all of the allegations of prior bad acts presented by the State Bar.

Without advanced notice that the State Bar would present testimony regarding a prior order by Judge Riegle in an unrelated matter and another by Judge Hunt in an unrelated matter, Petitioner Mirch was unprepared to defend himself against the allegations. The allegations of prior uncharged bad acts were vague, making it very difficult to defend against without prior notice.

4. STATE BAR FAILED TO PROVIDE ADEQUATE NOTICE THAT IT WOULD ALLEGE MIRCH'S FAILURE TO INVESTIGATE VIOLATED SCR 170

The State Bar of Nevada failed to provide Appellant Mirch adequate notice that the State Bar would allege and argue at the Hearing that Appellant Mirch had a duty pursuant to 5CR 170 to investigate and that Mirch's failure to investigate violated SCR 170. The State Bar's Formal Complaint relied solely upon the factual and legal findings contained in Judge Hardesty' s Order. Judge Hardesty's Order does not state that Mirch had a duty to investigate. Despite the lack of notice, the State Bar argued throughout the hearing that Mirch had a duty to investigate prior to filing the Complaint against Ms. Goddard and that Mirch's failure to investigate constituted a violation of SCR 170.

b. PETITIONER MIRCH WAS DENIED HIS RIGHT TO CONFRONT HIS ACCUSER

Petitioner Mirch was denied his right to confront his accuser, Judge Hardesty. The initial complaint in this ease was made to the State Bar by then District Court Judge Hardesty. Judge Hardesty directed that his written order be forwarded to the State Bar. Petitioner Mirch subpoenaed Judge Hardesty and the State Bar quashed the subpoena. Without the personal appearance of Judge Hardesty, the State Bar, despite objections, was allowed to introduce Judge Hardesty's Order as evidence.

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. See e.g. *ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93-94 (1913); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-104 (1963).

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of case where administrative.. . actions were under scrutiny.

Greene v. McElroy, 360 U.S. 437, 496-497 (1959).

The practice of law is a valuable property right. No one can be deprived of this valuable property right

without due process of law. *Burleigh v. State Bar*, 98 Nev 140 (1982). The fundamental requirements of due process are notice and an adequate opportunity to appear and contest charges. See *In re Shieh*, 738 A.2d 814, 816-17 (D.C.1999); *Jerome Mgmt. v. District of Columbia Rental Hous. Comm'n*, 682 A.2d 178, 183 (D.C.1996).

The United States Supreme Court has found in considering notice and due process requirements that State Bar Disciplinary proceedings are quasi-criminal in nature. *See In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222 (1968). Sixth Amendment rights may be implicated where the statement of a witness is introduced without giving the respondent a right to cross-examine the witness. See, e.g., *Crawfordv. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354 (2004). The principal evil at which the Confrontation Clause was directed was the use of ex parte examinations as evidence against the accused. *See Coy v. Iowa*, 487 U.S. 1012, 1015 (1988).

Petitioner Mirch should have been afforded the right to call Judge Hardesty as a witness, especially because Judge Hardesty's Order was offered as evidence against Mirch, absent any independent investigation of the Bar of the allegations contained therein. Although the Bar argued that it would be improper for Mirch to question Judge Hardesty about his thought processes, there was no indication that Mirch intended to question Judge Hardesty about his thought processes. That objection is properly made only after Mirch sought to inquire about Judge Hardesty's thought processes.

c. THE PANEL IMPROPERLY ALLOWED THE UNSWORN TESTIMONY OF BRUCE LAXALT

The State Bar of Nevada's Northern Disciplinary Panel should have granted Ms. Mirch's motion to strike Bruce Laxalt's testimony. The February 5, 2007, disciplinary hearing against Kevin J. Mirch, Esq., was a formal hearing. According to Nevada Supreme Court Rule 105(2)(e), during formal hearings, "[t]he rules applicable to the admission of evidence in the district courts of Nevada govern admission of evidence before a hearing Panel." Nevada District Court rules require witnesses to testify under oath. Specifically, Nevada District Court rule 43(b) provides that "[a]n oath is required to be taken ...." (emphasis added). Here, Mr. Laxalt did not testify under oath. As a result, the Panel should have granted Ms. Mirch's motion to strike Mr. Laxalt's testimony. The Nevada Supreme Court erred when it determined that Mr. Laxalt had been sworn in, and ignores the fact that the "swearing" was done after the fact, Mr. Laxalt had already testified, and was not subject to penalty of perjury during his testimony.

d. THE DECISIONS BELOW IGNORED THE NOTICE AND EVIDENTIARY REQUIREMENTS FOR SUMMARY JUDGMENT

The threshold issue in the context of sua sponte summary judgment is, whether the party was given notice that summary judgment is being contemplated by the court. *Gibson v. Mayor and Council of the City of Wilmington*, 355 F.3d 215, 222-23 (3d Cir. 2004).

The underlying bar complaint (Judge Hardesty's order) unconstitutional; in that Mr. Mirch was not afforded due process. Judge Hardesty took over a case being handled by Judge Adams; without notice to anyone changed a motion to dismiss into one for summary judgment; refused to allow Mr. Mirch discovery specifically requested in his opposition to motion to dismiss; refused to acknowledge Bankruptcy Judge Riblet's order to transfer all of Dr. Frank's assets to a Chapter 7 Trustee as part of a conversion from a Chapter 11 to a Chapter & Bankruptcy; and refused to follow applicable precedent. '-

Mr. Mirch had not means to protect himself from a number or horrific findings were adverse to the fact and law of the case. For no apparent reason other than to prevent the discovery of improper conduct by a prominent firm Judge Hardesty provided as follows:

> Footnote 11: Mirch seeks further discovery on all claims. However, nothing in discovery will salvage claims that are not legally cognizable.

Judge Hardesty's Order.

Mr. Mirch's Motion for Reconsideration provided a substantial number of exhibits that proved that McDonald Carano had interfered with his initial contract with Dr. Frank and subsequent settlement agreements; conspired to cause Mr. Mirch to be disbarred, and prevented him from disclosing misconduct as a Whistle blower.

Judge Hardesty ignored this evidence in favor of his own personal pursuit for a seat on the Nevada

Supreme Court, which was supported by McDonald Carano law firm. In fact, on senior partner hosted a fund-raising event for Judge Hardesty just days before he denied Petitioner's motion for reconsideration.

Under Canon 5 Judge Hardesty could not accept contributions from the McDonald Firm or any member of the firm:

> (5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household* not to accept, a gift, bequest, favor or loan from anyone except for:
>
> > (h) any other gift, bequest, favor or loan, only if: **the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge**; and, if its value exceeds $ 200, or an aggregate value of $ 200 for multiple gifts received from a single donor, the judge reports it in the same manner as the judge reports compensation in Section 4(I).

McDonald Carano was not just acting as attorneys but was a party before Judge Hardesty. Judge Hardesty should not have accepted contributions from McDonald Carano. By violating Canon 5, Judge Hardesty created an appearance of impropriety and further established his bias against Mr. Mirch. For that reason alone, Judge Hardesty's order should have been reversed, including the dismissal of the Bar Complaint.

This is an ugly case. A lawyer sued opposing counsel for threats that were made, which have come to fruition (sued for malpractice, criminal charges, and disbarment). The district court took a renegade approach to the matter, but that same district court judge now sits on the Nevada Supreme Court yielding tremendous power. The ugliness of the facts in this case have caused the district court, and now the Nevada Supreme Court, to dispense with constitutional rights, legal rights, discovery rights, and well established principals of law in order to justify a speedy disposition in favor of the Respondents.

On March 6, 2008, this Court entered an Order affirming the district court's sua sponte ruling in favor of the prestigious law firm of McDonald, Carano, Wilson. The Court concluded that the district court did not misstate or misapprehend facts or evidence submitted. Finally, this Court agreed with the district court's conclusion that the lawsuit was frivolous, and affirmed the draconian award of sanctions against Mr. Mirch.

In reaching this conclusion, this Court overlooked and misapprehended several material matters. Accordingly, this Petition should be granted. See, N.R.A. P. 49(c)(2).

1. The Bar Complaint Misapplied Well Established Law Directly Controlling the Outcome of the Case.

The State Bar and Nevada Supreme Court Court misapplied directly controlling precedent in its analysis of a dispositive issue. N.R.A.P. 49(c)(2)(ii).

Specifically to support the conclusion that the district court properly entered summary judgment, this Court fell to Respondents' red-herring argument. (i.e., character assassination of Mr. Mirch) as a basis for summary judgment, and threw the well established legal requirements of due process, notice, and summary judgment out the window. By excusing its fellow Justice's violation of Mr. Mirch's constitutional guaranty of due process, the Nevada Supreme Court violates the United States and Nevada Constitutions, and the controlling case law established in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 91 L.Ed. 2d 265 106 S. Ct. 2548 (1986) (court may enter summary judgment sua sponte as long as the losing party was on notice he had to come forward with all of his evidence); *Soebbing v. Carpet Barn, Inc.*, 109 Nev. 781 847 P.2d 731(1993) (Regardless of a claim's merit, a district court may not sua sponte enter summary judgment against it until the law requiring notice and a reasonable opportunity to be heard.

This underlying courts in upholding the order comprising the bar complaint made a factual error in assuming Petitioner waived notice. Waiver is "an intentional relinquishment or abandonment of a known right or privilege." *D.H. Overmyer Co. Inc. Of Ohio v. Frick Co.*, 405 U.S. 174, 185, 92 D. S.Ct 775, 782, 31 L.Ed.2d 124 (1972), *Johnson v. Zerbst*, 302 U.S. 458, 462 (1938); and as the United States Supreme Court has said in the civil area, "we do not presume acquiescence in the lost of fundamental rights, "*Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937). That standard is not satisfied here. The fundamental requirement of due process is "the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394. It is an

opportunity which must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo Et. Ux*, 380 U.S. 545, 85 S. Ct. 1187, 13 L. Ed. 2d 62 (1965). Mr. Mirch went to the courthouse prepared for a motion to dismiss. Mr. Mirch did not have all of his evidence with him to oppose a summary judgment motion, because there was no notice that a summary judgment was to be heard. The record confirms that the hearing was on a motion to dismiss. The due process requirement of adequate notice is not waived by appearance at a hearing *In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L. Ed. 2d 527 (1967). Furthermore, converting the motion well into the hearing was not notice at a meaningful time, and provided Mr. Mirch no opportunity to retrieve his evidence. In the present case, the trial court fully denied this right to Mr. Mirch, when even at the hearing, the district court expressed its indecision in whether it would convert the motion to dismiss into a summary judgment. In fact, throughout the hearing, the district court acted as if it were ruling on a motion to dismiss:

Well into the hearing, the district court stated that it is "compelled to consider the motion as one for summary judgment", and went forward with a hearing despite Mr. Mirch's prior objections. This sua sponte act of the district court violated Mr. Mirch's right to ten days' notice, which this the Nevada Bar and Supreme Court found acceptable.

The absence of notice to Mr. Mirch is no excusable even under the harmless error rule. In that regard footnote 8 at page 4 of the Order states that the failure to comply with the notice requirement of NRCP is subject to harmless error. *Exber, Inc. v. Sletten*

Construction Co. 92 Nev 721, 558, P.2d 517, 524 (1976). In *Exber*, a motion for summary judgment in favor of a party joining in another party's motion at the hearing was not prejudicial to the non-moving party because the court already had before it a motion for summary judgment which was joined at the hearing. Unlike the present case, the parties know that they were going to the courthouse to defend a motion for summary judgment, so there was no prejudice. The Court may allow a shortening of the 10 day notice requirement, but only if the opposing party would not suffer prejudice. *Cheek v. FNF Constr. Inc. 112 Nev. 1249, 924 P.2d 492 (1954).* In this case, Mr. Mirch was given no notice whatsoever, and was extremely prejudiced. He was denied any discovery, the district court cut short questions at the hearing (*Opening Brief 23-26*) (*Transcript 85-87, 97*), and denied leave to file a written opposition and evidence against summary judgment. That evidence included, but was not limited to: an affidavit of a witness who heard Ms. Goddard tell Dr. Frank to destroy his fee contract, testimony of Marilyn Bulloch that Dr. Frank told her that he was told by his attorney to destroy the contract, expert witness testimony by affidavit of the bankruptcy issues, and the controlling order of the U.S. Bankruptcy Court in the Frank bankruptcy case. *VIII AP 1604.*

The district court's denial of due process to Mr. Mirch was not harmless error. At a minimum, this Court should have reversed the order of summary judgment and referral to the State Bar and remanded the case to provide Mr. Mirch the opportunity to file an opposition to motion for summary judgment.

2. Burden on Moving Party

Furthermore, the Respondents never moved for summary judgment. Respondents never met their burden of affirmatively demonstrating the absence of a genuine issue of material fact. *Celotex Corporation v. Catretta*, supra. *Opening Brief at 23.* In *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the Court specifically stated.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

The District Court, Nevada State Bar and Nevada Supreme Court ignored this standard.

In order for a Motion for Summary Judgment to granted, evidence must be submitted. The evidence submitted is subject to special rules under NRCP 56(e). Under Rule 56, the moving party must identify and offer admissible evidence of specific facts showing that there is not genuine issue for trial. *See, Anderson v. Liberty Lobby*, 477 U.S. 242, 91 L.Ed2d 202 (1986); *Matsuhita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L.Ed. 2d 538, 106 S. Ct., 1348 (1986). Summary judgment cannot not lie where there is the slightest doubt as to the operative facts. *Washoe Medical Center v. Churchill County*, 108 Nev. 622, 625,

836 P.2d 624, 626, (1992). The courts have also stated that summary judgment should not be granted unless the truth is clear, or unless the moving party demonstrates a right to a judgment with such clarity that there is no room for controversy, and the opposing party cannot prevail, *Poller v. Columbia Broadcasting Systems, Inc.*, 82 S.C. 486, 368 U.S. 464, 7 L.Ed.2d 458. This Court misapplied this standard in affirming the district court's order.

The Defendants in the underlying civil suit did not move for summary judgment, they moved to dismiss. They expressly restricted the matters outside the pleadings to their motion for sanctions, and Mr. Mirch responded as such. There was absolutely no evidence offered in support of summary judgment. The Defendants did not even deny the threats which Mr. Mirch alleged in the underlying lawsuit. By affirming summary judgment in the absence of any evidence supporting the same, the Court ignored the requirements of NRCP 56.

Finally, the district court, State Bar and Nevada Supreme Court totally ignored the order of the United States Bankruptcy Court, Central District of California which required the bankrupt debtor, Dr. Frank to turn all of his assets over to the bankruptcy trustee.

3. The State Bar and Nevada Supreme Court has overlooked Nevada Case law Concerning the Whistle blower claim

The Order of Disbarment was for a violation of SCR 170, which Petitioner challenges an unconstitutional. Nevertheless, the State Bar

Disciplinary Board and Nevada Supreme Court's ruling that Mirch's whistle blower claim is a non- cognizable claim totally ignores and fails to follow Nevada law as set forth in *Clark v. Columbia\HCA*, 117 Nev. 468; 25 P.3d 215 (2001), wherein the Nevada Supreme Court specifically recognized a Whistle blower claim in Nevada:

> In his complaint, Clark has alleged tortuous conduct by respondents in the peer review board's decision to terminate his staff privileges. **He has also alleged** that respondents terminated his staff privileges because he reported violations of medical standards - **conduct we protect as a matter of public policy as whistle blowing**. See *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 293, 774 P.2d.432, 433 (1989); see also *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 1321-22,970 P.2d 1062, 1066-67 (1998) **Because Clark has alleged conduct that is actionable under our state laws,** this court has jurisdiction to hear this case.

Clark, supra at 476.

The State Bar and Nevada Supreme Court also ignored other statutory authority for a whistle blower claim, NRS 41.635 through 670, the anti-slapp statutes.

CONCLUSION

For the foregoing reasons, Petitioner respectfully request that this Honorable Court grant this petition.

Respectfully submitted,
Kevin Mirch, Esquire
Pro se
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320 Flint Street
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Case No. 02-05644 Dept. No. 9
IN THE SECOND JUDICIAL. DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE

KEVIN MIRCH,
Plaintiff,
v.
McDONALD, CARANO & WILSON, LLP., and
LEIGH GODDARD,
Defendants.

ORDER

The Court has reviewed and considered the points and authorities in support of and in opposition to Defendants' motion to dismiss filed on February 10, 2003. Additionally, the Court conducted oral argument on the Motion and, thereafter, ordered supplemental briefing. The Motion was submitted for decision on August 12, 2003.[1] Kevin Mirch, a Nevada attorney appearing in propria persona, filed the First Amended, Complaint on September 26, 2002. The Complaint names Doe Plaintiffs and alleges three claims for relief.

In his first claim for relief, Mirch seeks damages alleging intentional interference with present contractual relationships by Defendants with a Mr. & Mrs. Frank and one Denise Reed.[2]

The second claim for relief seeks damages for all Plaintiffs resulting from an alleged conspiracy by Defendants to commit bankruptcy fraud with Frank.[3]

The third claim for relief, captioned "Whistleblower", repeats the allegations contained in the second claim, alleges Mirch disclosed the alleged bankruptcy fraud to the Bankruptcy Court and seeks damages for all. Plaintiffs.

Defendants seek dismissal for failure to state a claim pursuant to NRCP 12(b)(5) and as a sanction pursuant to NRCP 11. Defendants also seek monetary sanctions for Mirth's alleged violation of NRCP 11. The parties have requested the Court consider matters outside the pleadings. As a consequence, the Court shall treat the Defendant's Motion to Dismiss as one for summary judgment under NRCP 56. See NRCP 12(b)(5).

The operative facts are not in dispute. In 1991, Mirch represented Advanced Physicians Products, Inc. (APPI) and Dr. Kenneth Frank in an action brought against them by Universal Sales, Inc. In September 1991. Mirch answered, counterclaimed and filed a third party claim adding new parties.

The litigation arose out of a Confidentiality and Non-Disclosure Agreement between APPI and Universal Sales, dated November 29, 1990. Frank developed a formula for nutritional supplements and assigned his rights to APPI. The Confidentiality Agreement protected the disclosure of confidential information by APPI to Universal Sales who, along with its predecessors, agreed to market the supplements. APPI/Frank claimed Universal Sales and others violated the Agreement and sought damages.

Mirch admits Frank developed the formula after Frank filed a Chapter 11 bankruptcy petition in 1984. A Plan

of reorganization was confirmed in Frank's bankruptcy in 1986. However, the bankruptcy was later converted to a Chapter 7 liquidation on May 17, 1994, and Frank was discharged October 12, 1994.

In March of 1995, Mirch obtained a default judgment for APPI and Frank in the sum of $3,400,000 against Universal States and the third parties. In 1999, an asset location firm identified several million dollars in Utah brokerage account owned by Universal Sales and/or the third parties. The broker interpled the funds in the United States District Court in Utah and the case was later transferred to the federal District Court in Nevada.

There are several claimants to the funds, including Mirch. Mirch claims he is entitled to a 40% contingency fee for his representation of APP/Frank.[5] Attorney Kent conflict. Thereafter, Defendants in this case commenced their representation of APPI/Frank. In addition to denying any contingency fee, APPI/Frank filed a malpractice claim against Mirch.[6] These matters are still pending before the Nevada federal District Court. However, Defendants have been forced to withdraw as counsel for APPI/Frank because of this action.

On May 25, 1999, Mirch sued his former client Denise Reed for non-payment of fees.[7] The case was initially referred to arbitration. The arbitrator entered an award in favor of Mirch on June 21, 2000. Reed sought a trial de novo and a verdict in favor of Mirch was returned by a jury on April 22, 2002. Post trial motions in the case are still pending.

As a threshold matter, the Court fails to see any basis for naming Doe Plaintiff's in this case. The First Amended Complaint names 77 parties who may be creditors of Frank between 1984 and 1994, alleging each of these individuals have been 'defrauded in the Bankruptcies filed by Mr. and Mrs. Frank. Damages are then sought for the Doe Plaintiffs for the alleged bankruptcy fraud under the second and third claims for relief.

However, Mirch admits he does not represent any of these parties, has not been authorized to file suit on their behalf and is not, himself, a creditor of the Frank bankruptcy. Moreover, the naming of these parties violates NRCP 10(a). "A party whose name is not known may be designated by any name, and when his true name is discovered, the pleading may be amended accordingly." Id. In this case, Mirch obviously knew the names of the parties making a potential claim for bankruptcy fraud. They were named in paragraph 2. None of these parties qualifies as a Doe party and their inclusion in the First Amended Complaint is improper.

More importantly, they have no claim against these Defendants for bankruptcy fraud and neither does Mirch. Federal law preempts the Doe Plaintiffs and Mirch's claim's for bankruptcy fraud in state court. The state court lacks jurisdiction-to hear these claims. Mirch is not a creditor in the bankruptcy case and lacks any standing to sue for alleged bankruptcy fraud committed on an estate in a case in which he is not a creditor Additionally, Judge Reed concluded on September 28, 2000, in the Nevada federal interpleader cases involving APPI/Frank and Universal Sales that Frank had no legal duty to disclose post-plan-acquired

assets to the Bankruptcy Court. Mirch is collaterally estopped on this issue.

Finally, 11 U.S.C. 541(a)(1) defines property of the bankruptcy estate as all legal and equitable interest of the debtor at the time the bankruptcy case commences. When an estate acquires property after the commencement of the case, such property is the debtor's property and remains distinct from the bankruptcy case. In re Smith, 235 F. 3d 472, 478 (9th Cir. 2000). Once a bankruptcy case is converted from one chapter to another under the Bankruptcy Code, the date of the filing of the petition or the commencement of the case does not change. 11 U.S.C. 348(a).

Here, Frank filed for Chapter I I bankruptcy on June 18, 1984. Pursuant to 11 US.C. 541(a)(1), Frank's bankruptcy estate was comprised of all legal or equitable interest he held as of June 18, 1984. Any property acquired by Frank subsequent to June 18, 1984, remains Frank's property, separate from the bankruptcy estate. Therefore, claims for breach of the November 29, 1990, Confidentiality and Non-Disclosure Agreement are not assets of the estate. Whatever disposition is made in the federal court to pay the 1995 default judgment, it is clear the creditors in the Frank bankruptcy have no claim to the funds.

Mirch's second claim for relief alleges conspiracy by Defendants and Frank to commit bankruptcy fraud on Mirch and the Doe Plaintiffs. "A civil conspiracy is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose or to accomplish sorne purpose not in itself criminal or unlawful by criminal or unlawful means." Eikelberger v

Tolotti, 96 Nev. 525, 528 n.1, 811 P2d 1086, 1089 n.1 (1980).

In effect, Mirch charges Frank and his counsel engineered the bankruptcy fraud on the creditors. This is absurd. Defendants did not become counsel for Frank until March of 2002, long after the events giving rise to these bankruptcy claims occurred.[8] Further, both Judge Reed and this Court have ruled that the claims against Universal Sales, et al., are not assets of the bankruptcy estate. Additionally, as noted, Mirch is not a creditor in the estate and, therefore, could have suffered no harm. Mirch fails to demonstrate a factual or legal basis for a criminal or unlawful purpose or means needed for a claim of conspiracy.[9]

The third claim for relief alleges Mirch is a whistleblower in the caption. However, it is impossible to discern what claim or legal theory is being alleged and how Mirch or the Doe Plaintiffs would have any right to damages under it. Mirch has failed to cite any legal authority to support a theory for this claim.

Good cause appearing, IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss is GRANTED as to Plaintiffs' Second and Third claims for relief and they are dismissed with prejudice. See NRCP 12(b)(5).

In his First Claim for Relief, Mirch alleges Defendants interfered with the contractual relations between himself, Frank and Reed individually. In an action for intentional interference with contractual relations the Plaintiff: must establish (1) a valid contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual

relationship; (4) actual disruption of the contract; and (5) resulting damage. ,JJ Industries, LLC, v Bennett,119 Nev. Adv. Rep. 33, 71 P3d 1264, 1267 (2003). Mirch cannot show Defendants caused the disruption and resulting damage as to either Frank or Reed.

With respect to Frank, Mirch claims that by defending a former client in an action in which Mirch and Frank have conflicting views over the attorney client contract, the lawyer defending the former client can be sued for interference with contractual relations.

This concept is preposterous and Mirch has offered no legal authority to support it. Carried to its most logical conclusion, no former client could ever be represented by an attorney, for to do so would constitute a tort by the counsel.

As to the claim that Defendants interfered with the Reed contract, the contractual relationship was the subject of litigation long before Defendants undertook representation of Frank. In that litigation, an arbitrator held in favor of Mirch more than 20 months before Defendants represented APPI/Frank in the federal action. Further, there is no showing that Defendants did anything to prevent Mirch from later obtaining a jury verdict against Reed.[10]

Good cause appearing, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss the First Claim for Relief is GRANTED and the claim is dismissed with prejudice.[11]

Defendants seek sanctions. pursuant to NRCP 11. Under this Rule, the signature by a party or lawyer constitutes a certification that, after reasonable inquiry, the pleading (a) is well grounded in fact, (b) is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law, and (c) is not filed for an improper purpose such as to harass or cause unnecessary delay or cost of litigation. Id. When an attorney or party violates NRCP 11, the Court "shall irnpose . . . an appropriate sanction . . .".Id.

Our High Court has made clear "NRCP 11 sanctions should be imposed for frivolous actions. Bergmann v. Boyce, 109 Nev. 670, 676, 866 P.2d 560, 564 (1993); citing Marshall v District Court, 108 Nev. 459, 455, 836 F.2d 47, 52 (1992). "A frivolous claim is one that is both baseless and made without a reasonable and competent inquiry." Id. citing Townsend v. Holman Consulting Corp., 929 F.2d 1353,162 (9th Cir. 1999). When determining whether a claim is frivolous, the Court shall apply a two-pronged analysis: "(1) the court must determine whether the pleading is 'well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law"' (Id.; citing Golden Eagle; 801 F.2d 1531, 1537 (9th Cir. 1986); and "(2) whether the attorney made a reasonable and competent inquiry." Id.

Under the first prong of the Bergmann analysis, "the trial court must examine the actual circumstances surrounding the case to determine whether the suspect claims were brought without reasonable grounds." Id.

In the First Amended Complaint, Mirch:

- accuses Defendants of committing bankruptcy fraud;
-alleges Defendants failed to produce or destroyed documents which would prove the bankruptcy fraud;
-alleges defendants could obtain favorable rulings in the pending federal litigation through the exercise of political influence on the federal judges presiding over the litigation; and
-alleges Defendants interfered with the contractual relations between Frank and another former client of Mirch.

As noted earlier, Mirch has offered no legal authority to support the claim that these Defendants committed bankruptcy fraud or that this Court has jurisdiction to award damages in such an went. Indeed, the Court was stunned to learn during oral argument that Mirch had not researched nor considered the effect of 11 U.S.C. 348 (a) on the claim of bankruptcy fraud. Further, the third claim is almost unintelligible. However, to the extent Plaintiffs seek damages regarding the assertion that Mirch is a whistleblower, the Court was neither provided with, nor found any legal authority supporting the application of this concept to the present factual circumstances.[12]

Furthermore, Mirch is not a creditor in the bankruptcy case, nor is there a basis for naming the Doe Plaintiffs in the Complaint. Mirch would have no claim even if bankruptcy fraud had been committed by Frank. Mirch offered no facts to support the allegation that Defendants had withheld or destroyed documents[13] and failed to cite a single instance in which a federal court order was the result of some alleged political influence

exerted by Defendants. Finally, Mirch offers no factual or legal basis to support the two interference claims.[14]

In short, the First Amended Complaint represents the most scandalous, unsupported pleading this Court has had the misfortune to read during its tenure on the bench. The Court finds the Complaint to be facially deficient and legally frivolous, and as a result, must now determine whether the pleading was interposed. for an improper purpose pursuant to NRCP 11.

The Complaint was filed on September 25, 2002, and the First Amended Complaint was filed the next day on September 26, 2002. A courtesy copy of the First Amended Complaint was provided to Ms. Goddard on the same day and just days before she was to depose Mirch in the federal case. However, Mirch waited until just three days remained before the time expired under NRCP 4(i) to personally serve the Defendants. It is apparent Mirch intended to create a conflict between Defendants and their client in the federal action. It worked. Defendants have been forced to withdraw from their representation of APPI/Frank in the federal case in order to defend themselves in this case. The Court finds the First Amended Complaint was interposed for the purpose of harassing Defendants and creating additional chaos in the federal court proceedings. The First Amended Complaint violates NRCP 11.

This case sets a dangerous precedent that cannot be overlooked by this Court. Where, as here, the Court finds Mirch violated NRCP 11, appropriate sanctions are mandatory. See also NRS 7.085.[15]

Initially, the Court believes Mirch has committed a violation of the Rules of Professional Conduct. See SCR 170. Pursuant to the Nevada Code of Judicial. Conduct Canon D(2), the Court refers this matter to the Nevada State Bar Counsel for disciplinay investigation. Defendants counsel is ordered to send a copy of this order and all pleadings in this case to Bar Counsel within 10 days of the date of this Order. Defendants seek monetary sanctions for their costs and fees in this matter. The assessment of added monetary sanctions may be appropriate in this case as a deterrence to future conduct. However, when assessing Rule 11 sanctions certain factors must be considered. Danvers v. Danvers, 959 F.2d 501, 505 (6th Cir. 1992). For the Court to properly evaluate those factors, Defendants and Mirch must supply certain financial information to the Court.

IT IS HEREBY ORDERED that the Defendants shall have fifteen (15) days from the date of the Order to file and serve, any affidavits setting forth their claim for fees and costs in this matter. Mirch shall have thirty (30) days from the date of this Order to provide the Court with a sworn financial statement dated no later than six (6) months from the date of the Order. The sworn financial statement shall be filed under seal by the clerk of the Court. Mirch shall notify Defendants of the filing of the sworn statement, but shall not be required to serve a copy of same. Mirch shall also file within thirty (30) days of the date of this Order, any opposition he shall have to the Defendants' claim for fees and costs. Defendants shall have five (5) days in which to reply to Mirch's opposition, with Defendants then resubmitting the Motion for decision.

Defendants have cited this Court a number of instances where Mirch has been previously sanctioned by courts, both in and out of the Second Judicial District Court for similar behavior.[16] Indeed, in one case a substantial sanction was imposed.

Perhaps monetary sanctions are not sufficient to deter improper conduct by this lawyer. Further, the Court is aware of at least one case in this District in which a Judge has recused himself in all future cases involving Mirch.[17] This is disruptive to the management of the District's caseload and creates a situation in which Mirch can avoid the judge without complying with the preemptory filing requirements.

In Young v. Ninth Judicial Dist. Court ex rel. County of Douglas, 107 Nev. 642, 818 P. 2d 844. (1991), our High Court stated a District Court possesses inherent power to impose sanctions in order to control the proceedings before it.[18] As a result, the Court may consider as a further appropriate sanction in this case, restricting Mirch's right to appear in cases in the Second Judicial District Court.

Such a sanction, if imposed, should be considered by the Second Judicial District Court in an en banc evidentiary hearing.[19] These issues raise further questions including Mirch's right to be put on notice of the possible sanction and an opportunity to be heard. Consequently, further briefing by the parties is warranted on these issues.

Good cause appearing, IT IS HEREBY ORDERED that Defendants submit supplemental authorities within fifteen (15) days of the date of this Order on the inherent power of the District Court to limit the right

of counsel to appear before the Second Judicial District Court. Thereafter, the Court will advise counsel of any further hearings to be conducted in this matter.

Dated this 9th day of October, 2003.

Footnotes

fn1 Pursuant to the request for assistance or the Department 6 caseload, the court reassigns this case to Department 9 for all further proceedings. SeeWDCR2(6).

fn2 During oral argument Mirch identified another client or former client with whom Defendants had allegedly interfered. However, no amendment of the Firt Amended Complaint has been sought and the Court will not consider this new party as part of this case.

fn3 Paragraph 35 of the First Amended Complaint alleges damages by Mirch of over $1,000,000. and by Doe Defendants (sic) of over $2,000,000. The Court understands this paragraph to mean or refer to the Doe Plaintiffs.

fn4 Paragraph 48 of the First Amended Complaint alleges damages by Mirch of over $1,000,000 and bar Doe Defendants (sic) of over $2,000,000. The Court understands this paragraph to mean or refer to the Doe plaintiffs.

fn5 Mirch initially filed suit against his former clients in state court. That was later removed and consolidated in the Nevada federal interpleader action.

fn6 The 1995 default judgment awarded $1,000,000 for personal losses caused by the emotional distress suffered by Frank. However, that part of the award was set aside in the federal interpleader action, the Court finding Frank was net a counterclaimant in the 1991 action and the corporation could not maintain a claim for personal losses. .

fn7 The Court takes Judicial Notice of Case No. CV99-02799 pending in the Second Judicial District Court. See NRS 47.130.

fn8 As defense counsel noted, Defendant Leigh Goddard was in college at the time Frank's bankruptcy converted to Chapter 7.

fn9 None ofthe cases cited in Mirch's supplemental brief support a claim for bankruptcy fraud in this case.

fn10 Interestingly, the jury's verdict resulted in an award of more money than Mirch claimed against Reed.

fn11 Mirch seeks further discovery on all claims. However, nothing in discovery will salvage claims that are not legally cognizable.

fn12 The legal concept of "whistleblower" has historically been limited to employer/employee situations. Mirch has offered no authority for the extension of this concept to this case.

fn13 When asked about this matter at oral argument, Mirch's sole reference is that he had turned over certain documents to Frank who stated he had turned the documents over to Defendants. Defendants

reported they did not have said documents. None of these allegations were supported by an affidavit or sworn testimony from anyone.

fn14 The Court has reviewed and considered the points and authorities provided in support of Mirch's contractual interference claims. See Eikelbergar v. Tolotti, 96 Nev. 525 (1980); J.J., Indus., LLC v Bennett, 71 P.3d 1204 (2003). In its determination, the Court has concluded that these cases fail to support Mirch's claim on this issue.

fn15 NRS 7085 If a court finds that an attorney has (1) Filed, maintained or defended a civil action or proceeding in any court in this state, and such action or defense is not well-grounded in fact or is not warranted by existing law or by an argument for changing the existing law that is made in good faith; or (2) Unreasonably and vexatiously extended a civil action or proceeding before any court in this state, the court shall require the attorney personally to pay the additional costs, expenses and attorney's fees reasonably incurred because of such conduct.

fn16 See Maerke v. Wilson, 53 F.3d 331 (5th Cir.1995), where the United State District Court for the Northern District of Ohio imposed sanctions of $50,000.00 against Mirch, finding that he had engaged in a "pattern of continuing egregious activity" during the course of litigation, and that "dismissal of the plaintiffs complaint is an insufficient sanction."

fn17 See Case No. CVOO-03939 in the Second Judicial District Court in which Judge Kosach refused to permit

the Clerk of Court to assign any future cases involving Mirch to Department 8.

fn18 However, a District Court's power may be limited when restricting an attorney's right to appear before it. See SCR 99 and Piazza v. Carson City, 552 F.Supp.1394 (D. Nev. 1987).

fn19 In view of the prior Order by Judge Kosach, he will not participate in any such hearing or in any decision involving the issues in this case.

Filed 4/10/08

IN THE SUPREME COURT
OF THE STATE OF NEVADA

IN THE MATTER OF DISCIPLINE OF KEVIN J. MIRCH, ESQ.

ORDER OF DISBARMENT

This is an automatic review of a Northern Nevada Disciplinary Board hearing panel's finding that attorney Kevin J. Mirch Violated SCR 170 (currently RPC 3.1)[1] and recommendation of disbarment.

The panel found a violation of SCR 170 by Mirch, based on his filing a state court lawsuit. against attorney Leigh Goddard and her law firm, McDonald. Carano & Wilson, LLP. The hearing panel found that this lawsuit was frivolous and filed with the intent to interfere and harass Goddard and the law firm in their representation of one of Mirch's former chents in a separate federal lawsuit. The panel concluded that the lawsuit was part of a pattern of misconduct and that disbarment was warranted. This automatic review followed.

Initially, Mirch claims that the state bar and the disciplinary panel committed several procedural errors that necessitate either a finding of no misconduct or a remand for a new hearing. These contentions lack merit.

Due Process

Mirch argues that his due proces rights were violated because the complaint insufficiently alleged what actions constituted a violation of SCR 470, he received no notice that the state bar would rely on prior uncharged bad acts as aggravating factors, he was not notified that the state bar would argue that serving the complaint within three days of NRCP 4(i)'s 120-day limit was a violation of SCR 170; and he was not informed that the state bar would argue that a failure to investigate was a violation of SCR 170.

1. Insufficient complaint

The state bar's disciplinary complaint incorporated the district court's order dismissing the state court action and alleged that the conduct described in the district court order violated SCR 170. Mirch argues that this was insufficient notice of the charges against him because the order addressed NRCP 11, not SCR 170.

SCR 105(2) requires that the state bar's complaint "be sufficiently, clear and specific to inform the attorney of the charges against him or her and the underlying conduct supporting the charges." Mirch provides no legal support for his argument that "the state bar cannot incorporate the district court order to set forth the conduct that supports the charges. The complaint stated what the charge was, and by incorporating the detailed order, provided an explanation of the actions that supported the charge. Both NRCP 11 and SCR 170 prohibit frivolous claims. The district court order was 12 pages long and provided a detailed explanation of why, the complaint was frivolous and improper. An attorney is expected to understand the ethical rules and

how those rules apply to his actions.[2] As a result, Mirch received adequate notice of the wrongdoing aleged.

2. Prior uncharged bad acts

Mirch's assertion that he was not provided sufficient notice of the use of prior bad, acts is iaccurate. The. state bar is required under SCR 105(2)(c) to provide to the attorney a list of witnesses and evidence it plans to introduce at the disciplinary hearing. The state bar followed this procedure in this case. It specifcally listed some prior cases that it would introduce, along with a general statement that it would introduce other court actions filed by Mirch that had been dismissed as frivolous for the purpose of demonstrating aggravating factors.

3. 120-day rule

Mirch claims that he did not have adequate notice of the state bar's intent to argue that his service of the complaint within three days of NRCP 4(i)'s 120-day limit was a violation of SCR 170. This claim lacks merit. The state bar did not argue that the delayed service violated SCR 170. Rather, the state bar introduced this conduct as part of its effort to show M.irch's intent, which was relevant to the panel's determination of the, appropriate discipline to impose.

4. Failure to investigate.

Mirch's final due process argument is that he did not receive adequate notice that the state bar would argue that a failure to investigate was a violation of SCR 170. Most of the testimony adduced and the arguments

made by Mirch at the disciplinary hearing, however, attempted to prove that he conducted a sufficient investigation. Therefore, his actions refute his argument that he was unaware that that the adequacy of his precomplaint investigation would be at issue during the disciplinary hearing. Additionally, Mirch provides no legal authority that requires the state bar to outline all the arguments it may present as to why an attorney's actions violated a professional conduct rule. Regardless, Mirch is expected to know the rules and what they require,[3] each cannot argue that he was unaware that a failure to investigate the facts prior to filing a lawsuit was a violation. Finally, Mirch's own expert stated that SCR 170 imposes a duty do investigate.

Duty to investigate under SCR 170

Mirch asserts that SCR 170 imposes no duty to investigate. However, Mirchs' own expert witness testified that, under the rule, a lawyer must research the applicable law and investigate the facts of the case to determine if a cause of action could be brought in good faith, we therefore reject Mirch's argument.

Bifurcated hearing.

Mirch asserts that the panel erred by allowing prior bad acts and victim impact testimony before a violation was found because this evidence improperly influenced the panel. Mirch failed to request a bifurcated disciplinary hearing, however, and thus he waived this argument.[4]

Right to confront accuser

The dicsiplinary complaint against Mirch was based on then District Hardesty's order granting summary judgment in the state court action. Mirch attempted to subpoena Judge Hardesty to testify at the disciplinary hearing, but the state bar successfully moved to quash the subpoena, arguing that a judge is protected from inquiry into his thought processes when ruling on a case. Mirch contends that his inability to question. Judge Hardesty violated his constitutional right to confront his accuser. Mirch's argument is based on the Sixth Amendment, which provides the defendant in a criminal case the right to confront his accuser.

While the United States Supreme Court has stated that attorney discipline is a quasi-criminal proceeding, and therefore due process rights apply,[5] a disciplinary: hearing is not the same as a criminal trial and not all of the constitutional guarantees afforded a criminal defendant apply.[6] SCR 107 states that a disciplinary proceeding may proceed even if the complainant refuses to participate. In addition, other states have held that a lawyer has no right to confront a disciplinary complainant. Specifically, these courts concluded that the complainant in an attorney discipline situation is different from an accuser in a criminal proceeding, and therefore the right does not apply.[7]

Additionally, the United States Supreme Court has held that a judge cannot be questioned concerning his thought processes in reaching a decision in a case.[8] Mirch failed to indicate what information, other than Judge Hardesty's though processes in the case, he would have sought. Therefore, Mirch failed to demonstrate that he wee harmed by the decision to

quash the subpoena. As a result, we conclude that no constitutional violation occurred.

Mirch's claim that Laxalt'stestimony was unsworn.

Mirch claims that the hearing panel allowed the unsworn testimony of witness Bruce Laxalt and that the panel erred by not striking the testimony. However, the disciplinary hearing transcript shows that Laxalt was sworn prior to his testimony. Therefore, Mirch's argument ill refuted by the record and lacks merit.

SCR 17 SCR 170 Violation

While a disciplinary panel's findings are persuasive, we review the record de novo to determine whether discipline is proper.[9] Our de novo review extends to the credibility of the witnessea that testify at the disciplinary hearing.[10] In disciplinary matters, the findings of fact must be "supported by clear and convincing evidence."[11] Clear and convincing evidence requires "evidence of tangible facts from which a legitimate inference may be drawn."[12]

After reviewing the entire record and the parties' briefs, we agree with the panel's finding that Mirch violated SCR 170. The pertinent part of SCR 170 stated the following:

> A lawyer, shall not bring or defend a proceeding, or assert or controvert an.issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a

> good faith argument for an extension, modification or reversal of existing law.

The state lawsuit filed by Mirch was frivolous and lacked any basis in law or fact. As a result, a violation occurred and discipline is proper.

Appropriate discipline

The disciplinary panel recommended that Mirch be disbarred for his misconduct. Basd on the circumstances surrounding Mirch's filing of the lawsuit, in connection with evidence that this action represented only one instance in a pattern of similar conduct, by Mirch, we approve the disciplinary panel's recommendation and disbar Mirch. [13] Additionally, Mirch is responsible for the payment of the disciplinary proceeding's costs.

It is so ORDERED.[14]

Footnotes

[1]The former version of the Supreme Court Rules governing professional misconduct is cited in this order, since Mirch's actions occurred before the Rules of Professional Misconduct were renumbered and amended in 2006.

[2] People v. Corbin, 82 P.3d 373, 376 (Colo. O.P.D.J. 2003); Matter of Farmer, 747 P.2d 97, 99-100 (Kan.1967).

[3] Id.

[4] See Diamond Enters. Inc. v. Lau, 113 Nev. 1376,1378, 951 P. 2d 73, 74 (1997).

[5] In re Ruffalo, 390 U.S. 644, 561 (1968).

[6] See Matter of Jacobs, 44 F.3d 84, 89 (2d Cir. 1994); In re Dasent, 846 N.E, 2d 1133;1136 (Mass. 2006); People v. Varallo, 913 P.2d 1, 3 (Colo. 1996); State v. Scott, 639 P.2d 1131, 1134 (Kan.1982).

[7]Daniels v. Commission for Lawyer Discipline, 142 S.W.3d 565, 571 (Tex. Ct. App. 2004); State v. Turner, 538 P. 2d 966, 974 (Kan.1975).

[8] United States v. Moran, 313 U.S. 409, 422 (1941).

[9]In re Discipline of Schaefer, 117 Nev. 496, 25 P. 3d 191, as modified 31 P.3d 365 (2001).

[10] See In re Drakulich, 111 Nev. 1566, 1569, 908 P.2d 709, 717 (1995)

[11]In re Stuhff, 108 Nev. 629, 6351,837 P.2d 853, 856 (1992).

[12] Id., quoting Gruber v. Balter, 20 Nev. 453, 477, 23 P. 858, 865 (1890).

[13] See parler & Wobber v. Miles & Stockbridge, 756 A. 2d 526, 545 (Md. 2000).

We note that this disbarment is imposed according to the former version of SCR 102, under which Mirch may petition for reinstatement after three years. The formal

complaint against Mirch was filed on June 15, 2004, when the former rule was in effect. See SCR 122 (2007).

[14] The Honorable William Maupin and James Hardesty, Justices, voluntarily recused themselves from participation in the decision of this matter.

Case No. N03-34-20
STATE BAR OF NEVADA
NORTHERN NEVADA DISCIPLINARY BOARD

STATE BAR OF NEVADA, Complainant,
KEVIN J. MIRCH, ESQ. Respondent.

DECISION, FINDINGS AND RECOMMENDATION

I

The formal hearing in this matter was held on February 5, 6, 7 and 12, 2007, at the Northern Nevada Bar Center. The State Bar of Nevada was represented by David A. Clark, Esq., Acting Bar Counsel. Respondent Kevin J. Mirch, Esq. was represented by himself and his wife, Marie Mirch, Esq. The hearing panel, having considered all of the evidence and the arguments of counsel, after deliberation and by unanimous vote makes the following decision, findings and recommendation:

DECISION

The conduct of respondent Kevin J. Mirch, Esq. alleged in the Complaint filed June 15, 2004, violated Nevada Supreme Court Rule 170 in that the First Amended Complaint filed September 26, 2002, in the Case of Kevin J. Mirch, Doe Plaintiffs A - Z, Plaintiffs v. McDonald Carano & Wilson, LLP, Leigh Goddard, and Doe Attorneys 1- 10, Case No. CV02-05644 in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, was in most material respects frivolous.

FINDINGS

1. As part of its evaluation of the evidence presented the hearing panel was required to assess the credibility of the witnesses. The panel members did not believe the testimony of respondent Kevin J. Mirch, Esq. or his witness Charles Thomas Wiseman, a.k.a. Beau Wiseman. The panel found the State Bar's expert Dennis Kennedy to be credible. The panel gave little or no weight to the testimony of David Hamilton, Esq. who first appeared in this case as counsel for respondent and then became an expert witness for respondent. Mr. Hamilton's advocacy skills are considerable, but the panel had serious doubts about his qualifications as an ethics expert.

2. The following allegations made in the First Amended Complaint in Mirch, et al. v. McDonald Carano & Wilson LLP, et al. were made without factual or legal foundation an are frivolous:

> 3. These Defendants [McDonald Carano & Wilson, LLP and Leigh Goddard, Esq.] have devised a scheme to prevent Mr. Mirch from, disclosing to the Franks' Creditors monies that they are due. These Defendants' scheme involves Bankruptcy Fraud. (3:7-9)[1]
>
> 11. During the course of the most recently filed federal action Mr. Mirch disclosed the bankruptcy fraud to Leigh Goddard. Ms. Goddard threatened Mr. Mirch with reprisal including suing him for malpractice if a disclosure was made to the Bankruptcy Court. (4:18-21)

12 Ms. Goddard made it very clear that Mr. Mirch would not be successful in the federal litigation because her firm had the ability to obtain favorable judgments in the Federal Court. (4:22-24)

14 During the course of the litigation, Ms. Goddard has destroyed or failed to provide documents which prove the bankruptcy fraud perpetrated by the Franks upon their creditors and has destroyed and/or failed to provide documents which proved the Mr. Mirch was entitled to a fee exceeding $1,000,000. (5:4-7)

15 During the course of this litigation, Ms. Goddard and/or her agents have contacted other of Mr. Mirch's clients and instructed them not to pay amounts due to his firm in an attempt to interfere with his business. (5:8-10)

17 Defendants intentionally interfere (sic) with Plaintiffs business in order to gain an unfair advantage in another litigation. The interference included interfering with the contractual obligation of Mr. and Mrs. Frank and their related entities to pay to Mr. Mirch over $1,000,000. Defendants also participated in a scheme to cause Ms. Denise Reed to renounce her contract with Mr. Mirch, Defendants participated with Ms. Reeds' counsel and other counsel in the Reno area to deprive s fee. (5:15-21)

20. Defendants' conduct substantially interfered with the ongoing business of Plaintiffs

and was intentional. It was intentionally done in order to stop Mr. Mirch from disclosing bankruptcy fraud to the United States Bankruptcy Court. (5:26-6:2)

28. Defendants intentionally conspired with the Franks to commit bankruptcy fraud and to interfere with Mr. Mirch's business relationships with his clients. (6:25-7:1)

30. Defendants committed the following overt acts in order to accomplish the above conspiracy. Ms. Goddard threatened reprisal against Mr. Mirch. The reprisals included suing Mr. Mirch for malpractice even though he had obtained a multimillion dollar judgment; contacting Mr. Mirch's clients and informing them not to pay on their contingent fee contracts; destroyed and/or hidden documents which prove Mr. Mirch is entitled to in excess of $1,000,000.00; and using her firm's political influence to affect Mr. Mirch's legal career. (7:5-11)

31. Defendants participated with Ms. Reeds' counsel and other counsel in the Reno area to deprive Mr. Mirch of his fee. (7:12-13)

33. Defendants' conduct was intentional and illegal. Mr. Mirch has refused to participate in the bankruptcy fraud engineered by Ms. Goddard and her firm and as a result has been maligned with his clients and in the legal community. It was intentionally done in order to stop Mr. Mirch from. disclosing bankruptcy fraud to the United States Bankruptcy Court. (7:16-20)

40. Defendants intentionally conspired with the Franks to commit bankruptcy fraud and to interfere with Mr. Mirch's business relationships with his clients. (8:15-17)

42. Ms. Goddard threatened reprisal against Mr. Mirch. The reprisals included suing Mr. Mirch for malpractice even though he had obtained a multi-million dollar judgment; contacting Mr. Mirch's clients and informing there not to pay on their contingent fee contracts; destroyed and/or hidden documents which prove Mr. Mirch is entitled to in excess of $1,000,000.00; and using her firm's political influence to affect Mr. Mirch's legal career. (8:21-26)

43. Defendants participated with Ms. Reeds' counsel and other counsel in the Reno area to deprive Mr. Mirch of his fee. (9:1-2)

46. Defendants' conduct was intentional and illegal. Mr. Mirch has refused to participate in the bankruptcy fraud engineered by Ms. Goddard and her firm and as a result has been maligned with his clients and in the legal community. It was intentionally done in order to stop Mr. Mirch from disclosing bankruptcy fraud to the United States Bankruptcy Court. (9:7-11)

3. The alleged conversation between Leigh Goddard ("Goddard") and Dr. Frank that occurred in Mr. Mirch's office during a break in a deposition in which Goddard told Dr. Frank to get rid of or destroy

the written fee agreement between Dr. Frank and respondent did not occur.

4. McDonald Carano & Wilson, LLP ("MCW") and Goddard did not devise scheme to prevent respondent from disclosing to the Franks' creditors monies that they are due. MCW and Goddard did not engage in bankruptcy fraud.

5. Goddard did not threaten respondent with reprisal including suing him for malpractice if a disclosure of alleged bankruptcy fraud was made to the bankruptcy court by respondent,

6. Goddard did not say that respondent would not be successful in the federal litigation because MCW had the ability to obtain favorable judgments in federal court.

7. Goddard did not destroy or fail to provide documents which proved the alleged bankruptcy fraud or documents which prove that respondent was entitled to a fee exceeding $1,000,000.00.

8. Neither Goddard nor anyone acting as her agent contacted any of respondent' clients and instructed them not to pay amounts due to respondent's firm in an attempt to interfere with respondent's business.

9. MCW and Goddard did not intentionally interfere with respondent's business in order to gain unfair advantage in other litigation, did not interfere with the contractual obligation of the Franks and their related entities to pay a fee to Mr. Mirch of over $1,000,000.00 and did not participate in a scheme to

cause Ms. Denise Reed to renounce he contract with respondent or otherwise participate with Ms. Reed's counsel and other counsel in the Reno Area to deprive respondent of his fee. To the contrary, the panel finds that the case of Mirch, et al. v. McDonald Carano & Wilson, LLP, et al, was initiated by respondent in order to gain an unfair advantage by disrupting the representation of Dr. Frank by MCW and Goddard.

10. MCW and Goddard did not conspire with the Franks to commit bankruptcy fraud or to interfere with respondent's business relationships with his clients.

11. Assuming, arguendo, that Dr. Frank committed bankruptcy fraud such was no "engineered" by Goddard or MCW.

12. Goddard did not threaten reprisal against respondent.

13. Respondent had no attorney-client relationship with any of the Doe Plaintiffs named in the First Amended Complaint in the case of Mirch, et al. v. McDonald Carano & Wilson, LLP, et al. and had no legal or factual basis upon which to seek damages on their behalf.

14. The American Bar Association's Annotated Model Rules of Professional Conduct, Fifth Edition, Jun 2003, states in its discussion of Rule 3.1[2]:

> "Although motives do not determine whether a claim is frivolous, such claims are often occasioned by an intent to harass, embarrass, or

otherwise injure or inconvenience a party, or by some other improper motive."

Respondent intended to harass, embarrass and otherwise injure and inconvenience MCW and Goddard in their representation of Dr. Frank in the underlying federal action.

15. Respondent is seasoned and experienced litigator who knew full well what he was doing and the effect it would have on MCW and Goddard, but did it anyway.

16. Respondent refused to accept responsibility for anything that was done in connection with the underlying litigation including his delivery of a so-called courtesy copy of the First Amended Complaint to Goddard just before she was scheduled to take the deposition of respondent's wife, respondent's failure and refusal to accept the offer of Bruce Laxalt, Esq., counsel for MCW and Goddard to accept service of the First Amended Complaint on behalf of his clients and the almost 120 day delay in serving the First Amended Complaint which respondent blamed on someone else in his office who was allegedly responsible for seeing that such mundane matters were attended to.

17. Respondent attempted to justify the Third Cause of Action in the First Amended Complaint, which states that it is a "Whistle Blower" cause of action by arguing that it is an anti- LAPP claim brought under the provisions of NR 41.635 to 41.670 but the Third Cause of Action is no such thing.

RECOMMENDATION

The hearing panel unanimously recommends that respondent Kevin J. March, Esq. be disbarred from the practice of law and that he be assessed the full costs of this disciplinary proceeding.[3]

DATED this 6th day of March, 2007.

Footnote

[1] Citations are to pages and lines of the First Amended Complaint in Mirch, et al. v. McDonald Carano & Wilson, LLP, et al. which is in evidence at pages 00057-04066 of Exhibit 1.

[2] Respondent was charged with violating SCR 170. While this proceeding was pending SCR 170 wasa replaced by Rule 3.1 of the Nevada Rules Professional Conduct. SCR 170 and NRPC 3.1 are identical.

[3] The versions of SCR 102 and 116(2) that were in effect when the Complaint in this case was filed provided that misconduct is grounds for disbarment and that a person who has been disbarred may not apply for reinstatement until the expiration of at least three years from the effective date of the disbarment. As amended by the Order entered in ADKT 392 effective March 1, 2007, SCR 102 provides for irrevocable disbarment and SCR 116 no longer provides any procedure for reinstatement of a disbarred attorney. The ADKT 392 Order amending the rules does not specify whether the amendments are applicable to cases pending when the amendments became effective and the panel takes no position on that issue, but suggests that should the Nevada Supreme Court agree with the recommendation for disbarment the order

should specify whether respondent may apply for reinstatement after three years or whether the disbarment is irrevocable.

RELEVANT PROVISIONS INVOLVED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Nev. R. Civ.P.RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

[As amended; effective January 1, 2005.]

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

[As amended; effective January 1, 2005.]

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for

the hearing. Motions for summary judgment and responses thereto shall include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. An order granting summary judgment shall set forth the undisputed material facts and legal determinations on which the court granted summary judgment.

[As amended; effective January 1, 2005.]

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in

the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

[As amended; effective January 1, 2005.]

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[As amended; effective January 1, 2005.]

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[As amended; effective January 1, 2005.]